

GERALD A. HENDERSON

IBLA 98-215

Decided December 12, 2001

Appeal from a decision of the Yuma Field Office, Bureau of Land Management, ordering suspension of residential occupancy on a mining claim. AZA 29524.

Affirmed as modified.

1. Mining Claims: Surface Uses--Mining Claims: Use and Occupancy
BLM properly orders an immediate suspension of use or occupancy under 43 CFR 3715.7-1(a) when it is begun before obtaining required state or Federal permits.

APPEARANCES: Gerald A. Henderson, pro se; Richard A. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Gerald A. Henderson has appealed the Notice of Immediate Suspension issued under 43 CFR 3715.7-1(a) by the Yuma (Arizona) Field Office, Bureau of Land Management (BLM), on February 5, 1998. BLM's Notice stated that a February 4 inspection of sections 25 and 36, T. 4 N., R. 21 W., and section 30, T. 4 N., R. 20 W., Gila & Salt River Meridian (G&SRM), in La Paz County, Arizona, revealed residential occupancy; construction of barriers and open trenches that blocked public access and created a hazard and a nuisance; placement and storage of equipment, building materials, materials for constructing a pipeline, litter, waste and debris that created a hazard and a nuisance; a lack of any substantially regular work that was reasonably calculated to lead to the extraction or beneficiation of minerals; and an absence of any observable on-the-ground mining activity. BLM's Notice ordered Henderson to cease all residential occupancy within 48 hours; to remove trailers, structures, and personal property in support of the occupancy within 5 days; and to remove all barricades, backfill all trenches, remove all equipment used in their construction, and remove all construction materials.

Henderson had filed a notice of intent to conduct mining operations on five acres or less on the Angle #1-7 claims, AMC 33980-33986, in sections 30 and 31, T. 4 N., R. 20 W., and sections 25 and 36, T. 4 N., R. 21 W., G&SRM, with BLM on February 23, 1996, in accordance with 43 CFR 3809.1-3. Henderson described his proposed operations as exploratory work:

"A wet [concentrator] will be set-up on claim #1 and or claim #5, 6, 7. Wells on claims will be used and or water hauled to the claims. Tank for holding water will be brought in or made on claims with back hoe type machine. Placer ground will be tested with same type of earth mover. Some blasting & blasting equipment may also be involved." He added: "Access is already established at gates off free-way. No new access should be needed. (Locked gates may be used to secure area.)"

BLM accepted Henderson's notice on March 4, 1996. BLM's letter to Henderson requested that he contact the BLM Area Manager before commencing operations so that a site inspection could be made. BLM's letter stated: "Public access can not be restricted by locked gates. All existing roads and/or trails shall be left unrestricted. * * * This notice does not authorize residential occupancy upon the project site."

On February 4, 1998, BLM Surface Protection Specialist Gary D. Rowell wrote the following inspection report concerning sections 25 and 36, T. 4 N., R. 21 W., G&SRM:

During a routine inspection, prior to a meeting with other claimants, I * * * observed a large trench which was dug across the opening to Farrar Gulch. No entry could be made. We went to the back side of the canyon and the entrance was blocked by large rocks and trenching. Returning to the entrance of Interstate 10 we saw Mr. Henderson's camp. Henderson was not at the site. This appears in no way to be any type of mining activity other than to block entrance to Public Lands.

Rowell noted there were an "RV trailer, Backhoe, Motorcycle, Van, Welder, Generator, Lumber, PVC Pipe [and] Construction Material" on the site, and characterized the operation as "Unauthorized Occupancy, degrad[a]tion to Public Lands."

Rowell returned the next day, February 5, to take photographs of the disturbed areas and the occupancy site and to deliver the Notice of Immediate Suspension to Henderson. The Notice stated that Henderson had not filed a notice under 43 CFR 3809.1-3 that covered all of the surface-disturbing activities and storage of equipment, had not applied for the grace period under 43 CFR 3715.4, and did not have written concurrence from BLM under 43 CFR 3715.3-4 for the occupancy. The Notice stated that Henderson was in violation of 43 CFR 3715.4 because his occupancy did not meet the requirements of 43 CFR Subpart 3715 as of August 18, 1997 (the date provided in 43 CFR 3715.4(a) for existing uses and occupancies to meet the requirements of the subpart); of 43 CFR 3715.5 because he had begun construction of exclosures before obtaining all applicable Federal and state environmental permits; and of 43 CFR 3715.6(h) for causing a safety hazard and creating a public nuisance by having open trenches and barriers on the mining claims.

The Notice listed several conditions Henderson was to meet before resuming occupancy, including submission to BLM of evidence that he had

obtained an aquifer protection permit from the State of Arizona and a National Pollutant Discharge Elimination Permit from the U.S. Environmental Protection Agency, or letters from those agencies that he did not need them, and had submitted the information required under 43 CFR 3715.3 and received written concurrence from BLM under 43 CFR 3715.3-4. The Notice also stated that Henderson must post a reclamation bond of not less than \$1000/acre before initiating operations under a notice and provide a certification of financial guarantee with a calculation of reclamation costs under 43 CFR 3809.1-9.

The Notice stated that failure to comply with the terms of BLM's order would subject Henderson to civil action under 43 CFR 3715.7-2 and criminal penalties under 43 CFR 3715.8. It also stated that any property remaining on public lands after five days would become property of the United States and that Henderson would be liable for BLM's costs of removing and disposing of the property under 43 CFR 3715.5-2. Finally, it stated that an appeal to this Board under 43 CFR 3715.9 would not suspend BLM's order. See 43 CFR 3715.9-1.

A further inspection report dated February 12, 1998, noted that a backhoe, PVC pipe, lumber, generator and motorcycle were still on the site and that the trenches had not been reclaimed.

BLM states:

On March 10, 1998, the Yuma Field Office began reclamation of the site. Access through Farrar Gulch has been restored and regrading of the disturbance has been completed. * * * [R]evegetation has not yet been completed and total reclamation costs are estimated at \$3,000."

Answer at 4.

In his statement of reasons for appeal (SOR) Henderson acknowledges he had a trailer on the claim and states that it was being used for purposes directly related and incidental to his mining operation. He asserts that any barriers and open trenches did not block public access because no public access was available. "All roads located on the claim were constructed by previous miners and have been in a state of change for years[;] * * * 'no public access' exists to the mining claim off Interstate 10." (SOR at 2.) "The only barriers constructed on said mining claim were in protection of the public, in an effort to prevent * * * such person or persons from harm, from any mining activity, and or equipment located on the claim." Id. Henderson states that all the building materials, pipe, and other materials on the site were necessary for his mining operation. Id. at 3. That operation falls within the definition of "substantially regular work" in 43 CFR 3715.0-5, Henderson states. Henderson states that the notice he filed on February 23, 1996, under 43 CFR 3809.1-3 did cover all surface-disturbing activities and storage of equipment. Id. at 4. Henderson states that he "had given notice to the B.L.M. of his occupancy [under 43 CFR 3715.4] but was told that such existing occupancy required no further written notice." Id. Henderson contends

that his residential occupancy was required to protect his equipment and accessible valuable minerals from theft or loss. Id. at 6. He states that "although he did not file a plan of occupancy under a 3715 filing, he did attempt to make agents for the B.L.M. aware of his occupancy. Further, * * * since no approved plan of operations was required, [he] was unaware an approved plan of occupancy was necessary, and therefore under the circumstances should be considered a technical error and that [his] rights be protected." Id. at 6-7.

Henderson adds that BLM did not inform him after he filed his notice under 43 CFR 3809.1-3 that he would need to obtain any permits before excavating. Id. at 7. Henderson states the trenches were made with a backhoe in order to test the placer ground, as indicated in his 43 CFR 3809.1-3 notice. Id. at 9. Henderson argues that bonding is not required for operations that disturb five acres or less. Id. at 10. He argues that his civil rights have been violated, he has been denied due process of law by the Department, and he has been discriminated against due to the size and nature of his operation. Id.

[1] BLM's regulations in 43 CFR Subpart 3715 were published in July 1996. 61 FR 37115, 37125 (July 16, 1996). They included a provision stating that within a year, by August 18, 1997, "all existing uses and occupancies must meet the applicable requirements of this subpart." 43 CFR 3715.4. "If not, BLM will either issue you a notice of noncompliance or order any existing use or occupancy failing to meet the requirements of this subpart to suspend or cease under § 3715.7-1." Id. BLM's March 4, 1996, acceptance of Henderson's notice under 43 CFR 3809.1-3 stated that it did not authorize residential occupancy and the record contains no indication that Henderson later requested or BLM later authorized occupancy. Therefore, the provisions of 43 CFR 3715.4(d) apply to Henderson's operations. They state:

(d) If you have no existing occupancies, but are engaged in uses of the public lands under the mining law, you are subject to the standards in § 3715.5. BLM will determine if your existing uses comply with those standards during normal inspection visits to the area and during BLM review of notices and plans of operations filed under 43 CFR part 3800.

43 CFR 3715.5(b) requires that uses conform to all state and Federal environmental standards and that all required permits be obtained before beginning. BLM was not required to give Henderson notice of the regulations in Subpart 3715; Henderson was presumed to have knowledge of them. Bradshaw Industries, 152 IBLA 57, 62 (2000).

Henderson acknowledged, and the record confirms, that he had a trailer on the claim on February 4, 1998, and the record also establishes that the trench he dug blocked access to public land from Interstate 10 via an existing road or trail. See February 5, 1998, Inspection Report, photographs 2, 4, 10 and 16. These constitute violations of 43 CFR 3715.6(c) and (g). 43 CFR 3715.6(c) prohibits beginning occupancy before

consultation with BLM as required by 43 CFR 3715.3 for activities that do not require a plan of operations or are defined as notice activities under 43 CFR Subpart 3809. Since Henderson was conducting operations under the notice provisions of 43 CFR 3809.1-3, he was required to submit the materials required by 43 CFR 3715.3-2. 43 CFR 3715.3, Table 2. Submission of those materials was also required before constructing enclosures, fences, gates, or signs intended to exclude the general public, *id.*, and 43 CFR 3715.6(g) prohibits "[p]lacing, constructing, or maintaining enclosures, gates, or fences, or signs intended to exclude the general public, without BLM's concurrence." ^{1/}

Henderson also acknowledged he did not obtain the necessary state or Federal permits before beginning construction. This failure to comply with 43 CFR 3715.5(b) is the basis for BLM's issuance of the Notice of Immediate Suspension under 43 CFR 3715.7-1(a). We hold it was properly issued.

Henderson's due process rights have not been violated. There is no infringement of constitutional rights in every case in which there is an alleged deprivation of property rights. An appellant's due process rights are satisfied by the right to appeal to this Board. Arthur Farthing, 136 IBLA 70, 75 (1996). As the Supreme Court has stated, "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." United States v. Locke, 471 U.S. 84, 107 (1985). In our view, the Subpart 3715 regulations enforced by BLM in this case are reasonable restrictions designed to manage the use and occupancy of the public lands for the development of locatable mineral deposits and to prevent the abuse of the public lands. See 43 CFR 3715.0-1(a).

We must modify BLM's Notice in one further respect. 43 CFR 3809.1-9(a)(1997) does not require posting of a bond for operations conducted under a notice. See also 43 CFR 3809.1-9(a)(2000).

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is affirmed as modified.

Will A. Irwin
Administrative Judge

I concur:

T. Britt Price
Administrative Judge

^{1/} We note that Henderson's conviction for violating 43 CFR 3715.6(g) was upheld by the U.S. Court of Appeals for the Ninth Circuit. United States v. Henderson, 243 F.3d 1168 (2001).